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No. 82-849

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Our contention in this case is that the United States may not be foreclosed from litigating a question of constitutional law of public importance by the unappealed adverse judgment of a district court in another case brought by a different opposing party. If upheld, the decision of the court of appeals would lead to a substantial alteration in litigation practices in the federal courts, because, in order to protect the public interest, the United States would be obliged to appeal from every adverse decision upon a question of law that affects or might affect its legal relations with other persons. The risk of preclusion would thrust aside the varied prudential considerations that frequently lead the government to eschew appeal in such cases under the present legal regime (see U.S.

Br. 30-31). While otherwise avoidable appeals would proliferate, this Court would be prevented from resolving the kind of recurring questions of national importance that divide the courts of appeals, because no such division would be tolerated. Thus, unless the United States were to seek and the Court were to grant certiorari following the first adverse decision rendered by a court of appeals, this Court's role as the final judicial arbiter of legal issues would be substantially impaired, and erroneous decisions would be given binding nationwide effect.

Respondent has not attempted any comprehensive answer to our contentions or provided any justification for this Court to endorse such a radical reworking of the existing judicial mechanisms for developing uniform, carefully considered and correct rules of public law. Indeed, respondent appears to concede that our analysis has force and would govern a wide range of other situations (see, *e.g.*, Resp. Br. 1, 17-19, 22-23, 26). But respondent offers a variety of reasons why *this* case should not be governed by the considerations that we have outlined. As we shall explain, the fact-bound distinctions upon which respondent relies do not withstand examination. But before turning to these points, we pause to emphasize a threshold point. Respondent is simply unable to identify any objective rules that would enable the courts to determine when collateral estoppel should be applied against the United States on questions of public law. Absent such rules, the government will necessarily be unable to predict with any degree of certainty the consequences of a decision to forego appellate review in a given case, and will be driven to adopt a less discriminating litigation posture that will burden the appellate courts with unnecessary

appeals. Furthermore, if the decision below were upheld, the scope of collateral estoppel itself would become a frequently litigated issue—a result entirely antithetical to the purposes that underlie the preclusion doctrine.

The unworkability of the subjective approach advanced by respondent is highlighted by comparing respondent's argument with that of the respondent in *United States* v. *Stauffer Chemical Co.*, No. 82-1448. Like Mendoza, Stauffer concedes (82-1448 Br. 25) that our argument may govern some class of cases, but claims that its own case is to be distinguished. Indeed, each respondent declines to defend the reasoning or result in the other's case (see 82-849 Resp. Br. 19; 82-1448 Resp. Br. 20 n.17, 26 n.23). The Court accordingly should be skeptical of the amorphous, self-serving formulations offered by these respondents to limit the general rules for which we argue.[1]

The shortcomings of respondent's approach must be assessed, moreover, against the alternative rule that we favor. Instead of the novel extension of collateral estoppel embraced by the courts of appeals in this case and *Stauffer*, we urge continued adherence to the traditional rules of stare decisis and res judicata as the best means for limiting unjustifiable relitigation without stifling the appropriate development of the law. Respondent has not offered any reason why continued application of the existing regime would not provide an adequate check upon the possibility of abusive or harassing relitigation. Nor has respondent explained why the policies underlying the

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[1] Copies of our opening brief and reply brief in No. 82-1448 have been provided to counsel for respondent.

issue preclusion doctrine require that he be excused from establishing his legal entitlement to naturalization.

A. 1. The court of appeals provided no explanation as to why this case was not controlled by the "unmixed questions of law" exception to the doctrine of collateral estoppel (see U.S. Br. 22). Respondent's effort (Br. 15-17) to supply a justification for that oversight is unsuccessful. Respondent does not deny that the underlying issue in this case is of constitutional dimensions (see Resp. Br. 14: "whether the Attorney General had the constitutional power to withhold the services of a naturalization representative from the Phillippines"). Instead, respondent invokes the "same 'demand' " rule that qualifies the unmixed question of law exception. But contrary to respondent's assertion (Br. 15-16), nothing in *Montana* v. *United States*, 440 U.S. 147 (1979), suggests that it is irrelevant for this purpose that respondent was not a party in the prior case, *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). In *Montana*, of course, the party invoking the estoppel against the United States was the very party that had prevailed against the government's privy in the prior round of litigation presenting the issue. See 440 U.S. at 151.[2] Accordingly, the Court's holding in *Montana* that the near identity of the timing and subject matter of the two law suits made the "same 'demand' " rule—rather that the unmixed question of law doctrine—controlling provides no support for respondent's claim that *68*

[2] Similarly, in *Moser*, the "same 'demand' " rule was applied in a situation where the party invoking the estoppel was the one that previously had prevailed on the issue being litigated.

Filipinos should be treated as though it adjudicated his rights.

The "unmixed questions of law" exception recognized in *United States* v. *Moser*, 266 U.S. 236, 242 (1924) is stated in terms that presuppose an identity of parties, not because different parties were thought to render that exception inoperative, but because at the time *Moser* was decided it was settled that collateral estoppel itself had no application absent mutuality of estoppel. But even after the demise of the strict rule of mutuality, identity of parties is a significant consideration bearing on the scope of preclusion, at least on issues of law.

First, the availability, on liberal terms, of joinder, consolidation and class actions in many situations where common questions of law control the rights of similarly situated persons counsels against application of issue preclusion on legal questions where identity of parties is lacking.[3] Second, the applicability of stare decisis to questions of law and the persuasive force of decisions of coordinate and inferior courts on such questions is sufficient to prevent abusive relitigation. Third, although, as we argue in *Stauffer*, identity of parties in a prior case is not a *sufficient*

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[3] Collateral estoppel would not, as respondent claims (Br. 6 n.2), become "meaningless" if tailored so as to avoid preempting the function of class actions. Collateral estoppel would remain applicable, within established limits, to factual issues, and to fact-bound questions of law arising between parties that have previously litigated them. Given the choice as to which of the two legal regimes should govern the development of the law on a recurring question, the class action, which places all parties on notice as to the reach of the judgment to be entered, is far preferable to collateral estoppel, which provides no such certainty and which accordingly is likely to provoke further litigation about the scope of the initial judgment.

basis for estopping the government from securing a determination of a recurring question of public law of general applicability, it is assuredly a *necessary* condition if preclusion is to serve the purpose of "protecting litigants from the burden of relitigating an identical issue with the same party" (*Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979)). Moreover, respondent makes no effort to justify the extension of collateral estoppel he unabashedly advocates (see Br. 10) in terms of the other policies ordinarily served by preclusion (compare U.S. Br. 24-25). And we submit that there can be no justification for relieving respondent of the requirement that he establish legal grounds for naturalization before he is accorded that " 'priceless treasure' " conferred by our laws. *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981) (citation omitted).

2. Even if the lack of identity between the parties in this case and *68 Filipinos* does not make the "same 'demand' " rule inapplicable, we could not agree with respondent's assertion that here, as in *Montana* (440 U.S. at 163), the legal demands of the successive lawsuits are so "closely aligned in time and subject matter" that a determination on the merits of the question of law is precluded. Respondent observes that both this case and *68 Filipinos* "concerned events that occurred in the aftermath of World War II, and both involved the constitutionality of the Attorney General's conduct at that time" (Br. 16). But this establishes only that the cases present common legal questions about particular official acts affecting numerous persons. If this degree of identity were sufficient to trigger the "same 'demand' " rule, the government would be obliged to take to this Court every case involving a challenge to legislative or executive

action affecting a class of persons, lest an adverse decision acquire class-wise preclusive effect. Cf. *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), slip op. 2-3 (Brennan, J., concurring).[4]

But there is no warrant for reading *Montana* in this fashion. Instead, we suggest that the Court's emphasis (440 U.S. at 163) upon the congruent timing of the successive lawsuits there was directed at the seemingly manipulative aspect of the duplicative litigation initiated by the government in that case. See 440 U.S. at 151-152; see U.S. Br. 35. Here, of course, there is no such close alignment in the timing of this case and *68 Filipinos*. Moreover, the initiation and the timing of both this case and *68 Filipinos* was in the control of the respective petitioners for naturalization; the government accordingly cannot be charged with seeking to relitigate the underlying issue. Instead, when respondent filed his petition for naturalization, the government simply insisted that the eligibility requirements for naturalization established by Congress be enforced. In sum, respondent Mendoza's "demand" to become a United States citizen cannot be considered the "same 'demand' " as the naturalization claims of the unrelated Filipino aliens in *68 Filipinos*.

B. Respondent appears to acknowledge (Br. 17, 19, 22) that the responsibility of the United States for enforcing Acts of Congress and the unique dynamics of the development of public law in govern-

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[4] We note that the Court repeatedly has recognized—without any hint of disapproval—the IRS' longstanding practice of formal nonacquiescence in decisions of the lower federal courts that it deems erroneous. See, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 483 n.18 (1979); *Dixon* v. *United States*, 381 U.S. 68, 72-75 & n.8 (1965).

ment cases that we outline in our opening brief (U.S. Br. 25-36) preclude application of collateral estoppel "in many situations" (Resp. Br. 22). But respondent urges that these considerations should not govern this case, asserting that the underlying issue is insufficiently important to warrant a determination on the merits (Br. 17-21), that development of the law would not be frozen if preclusion is applied here (Br. 21-23), and that preclusion would not be unfair to the government on the facts of this case (Br. 5-9). None of these arguments establishes any reason for relieving respondent of his obligation to establish a basis in law for his naturalization.

1. a. Respondent asserts (Br. 17) that the "war veterans litigation no longer involves issues of national importance" (Br. 17). But the underlying issue in this case, to which the issue preclusion doctrine was applied, is not whether it is desirable or acceptable as a matter of policy that respondent become a United States citizen.[5] Rather, any determination that respondent has a legal *right* to naturalization must resolve questions including whether the Attorney General's administration of Sections 701 and 702 of the Nationality Act of 1940 in the Philippines was unlawful, and if so, whether respondent was denied due process thereby and whether such a violation dictates that he be naturalized notwithstanding his inability to satisfy explicit statutory requirements

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[5] That, by contrast, is essentially what the government decided as to the naturalization petitioners in *68 Filipinos* when the appeal in that case was abandoned (U.S. Br. 11-12). As we have explained (U.S. Br. 30-31), the Solicitor General ordinarily considers a host of factors apart from the merits of the legal conclusions supporting a decision in determining whether further review is warranted.

for that benefit. These are issues of continuing importance, for it cannot be held that respondent is entitled to naturalization unless it is first established that the Attorney General is entirely without discretion to take into account pressing foreign relations interests of the United States in implementing the immigration and naturalization laws that he is charged with administering.[6] While the precise circumstances that led to the Filipino veterans litigation are necessarily unlikely to be repeated, the decision of the court of appeals perpetuates a highly restrictive view of the constitutional authority of the Executive branch to conduct the foreign affairs of the United States.

The second issue of enduring significance implicated in this case is whether the courts may effec-

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[6] The district court in *68 Filipinos* conceded that "the actions of the Commissioner of the INS were motivated by reasonable concern for the maintenance of amicable relations between the United States and the Philippine Islands" (406 F. Supp. at 951). Absent a determination that Section 702 deprived the Attorney General of all discretion, requiring him to make a naturalization representative available at all times wherever United States military personnel could be found, there is no basis for overriding the Attorney General's judgment in this matter. The *68 Filipinos* court, however, made no such determination. (Respondent appears to forget this (Br. 21 n.10).) Rather, its decision rested upon the novel view that absence of a naturalization officer from the Philippines for a part of the time Section 702 was in effect constituted discrimination on the basis of alienage, race or nationality that is subject to strict equal protection scrutiny under the Due Process Clause. This analysis would drastically restrict the United States' ability to deal with a host of difficult contemporary problems, such as those triggered recently by influxes of refugees from various nations, where delicate foreign relations concerns must be accommodated in the administration of the immigration laws.

tively circumvent the conditions that Congress has established pursuant to its constitutional authority to "establish a uniform Rule of Naturalization" (Art. I, § 8, Cl. 4). Respondent has never contended that he filed his petition for naturalization within the deadline fixed by Congress in Section 701 of the Nationality Act of 1940. And he has never established any reason for disregarding Congress's determination—reflected in 8 U.S.C. 1421(e)—that naturalization under expired provisions of law should be barred. Yet, because of the constitutional basis for the judgment in *68 Filipinos*, Congress is powerless, under the court of appeals' rationale, to deny naturalization to any Filipino veteran, at least if he resides within the Ninth Circuit.

This Court long ago recognized that "[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress." *United States* v. *Ginsberg*, 243 U.S. 472, 474-475 (1917). Because "Congress alone has the constitutional authority to prescribe rules for naturalization * * * the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship by naturalization legislated to safeguard the integrity of this 'priceless treasure.'" *Fedorenko* v. *United States*, 449 U.S. at 506-507 (citation omitted). The Court has emphasized that "[e]nforcing the immigration laws" entails "[a]n increasingly important interest implicating matters of broad public concern." *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 5. Finally, the Court emphasized in *INS* v. *Hibi*, 414 U.S. 5, 8 (1973), that "in enforcing the cutoff date established by Congress [in Section 701 of the Nationality Act of 1940, the INS] is enforcing public

policy established by Congress." Accordingly, respondent's suggestion that no issue of national importance remains in this case must be rejected. Indeed, the Court's determination, in *Hibi*, that the compelling public interest that sets the United States apart from "a private litigant with respect to its enforcement of laws enacted by Congress" (414 U.S. at 8) forecloses application of ordinary rules of equitable estoppel to the United States, is sufficient to dispose of respondent's present contention, as well.[7]

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[7] We note that respondent has not quarreled with our demonstration (U.S. Br. 42-43 & n.33) that the substance of the due process argument endorsed by the district court in *68 Filipinos* had been rejected by this Court in *Hibi* itself.

Respondent does assert (Br. 13) that in *68 Filipinos* the district court rejected *sub silentio* the government's arguments on issues not addressed in its opinion, and that the court of appeals accordingly properly declined to address those issues in this case. Compare U.S. Br. 39. Respondent's assertion, however, is supported only by citation of the government's appellate brief in *68 Filipinos*, which was withdrawn. And even then respondent relies almost entirely on portions of that brief directed to the claims of "category I" veterans. Our review of the government's brief in opposition to naturalization in *68 Filipinos* confirms that the government did not argue in the district court that the "category II" petitions should be denied on the basis of laches, 8 U.S.C. 1421(e), or that *Hibi* bars the *remedy* of naturalization even if a due process violation were found—the specific argument based on *Hibi* that the court of appeals sidestepped here. (The discussion of *Hibi* in *68 Filipinos* itself does not pertain to this argument, either.) Finally, respondent acknowledges (Br. 14) that *68 Filipinos* did not address the facts of his case that call in question his standing to raise the due process claim. See U.S. Br. 39-42. Respondent's suggestion that the government nevertheless has had "its very full day in court" (Br. 15) is therefore incomprehensible.

b. Even if respondent's arguments for carving out an exception for this case from the general rule limiting collateral estoppel were more persuasive when viewed in isolation, their application would yield undesirable results and would undermine rather than advance the policies of collateral estoppel. It is simply impossible to draw a bright line between issues of "national importance" and other issues of lesser importance.[8] Under this standard, reasonable minds frequently would differ as to how any given issue ought to be classified. As a result, the government would be obliged to protect itself against the possibility of preclusion by appealing or seeking certiorari in a significant number of cases not deemed appeal-worthy or cert-worthy under present criteria (see U.S. Br. 31). Moreover, whenever the government eschewed an appeal and the legal issue addressed arose in a subsequent action, burdensome litigation respecting the applicability of collateral estoppel would be unavoidable. Such litigation would be particularly intractable because of a conspicuous lack of "judicially discoverable and manageable standards" (*Baker* v. *Carr*, 369 U.S. 186, 217 (1962)) by which to determine whether an issue is sufficiently important to warrant a fresh determination.[9]

On the other hand, there is no reason to believe, given the rule of stare decisis, that failure to apply

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[8] In the federal system, this Court alone exercises its jurisdiction on the basis of the importance of the issues presented in the cases coming before it. The courts of appeals have no such discretionary authority to refuse to decide legal issues in cases properly within their jurisdiction.

[9] Counting the amicus briefs filed in this (or any other) Court hardly provides an objective measure of importance of the underlying issue. Compare Resp. Br. 20.

the preclusion doctrine will foster undue relitigation. Contrary to respondent's suggestion (Br. 25), the litigating resources of the United States are sufficiently limited in comparison to its litigating responsibilities that powerful practical incentives foreclose improper relitigation. Furthermore, as we have explained (Br. 30-34), the principles of self-restraint and selectivity in government litigation have been institutionalized in the Office of the Solicitor General, which determines when a legal issue is of sufficient importance to the interests of the United States to warrant appellate litigation. Respondent has not demonstrated any pattern of unwarranted litigation that would support the proposed transfer of this function from the Executive Branch to the courts.[10]

2. Respondent acknowledges (Br. 22) that application of collateral estoppel to bind the government on legal issues could cripple the customary process of development of the public law through independent consideration of an issue by the various courts of appeals, with final resolution in this Court where further review is warranted. But respondent claims that the decision below does not present this problem because *68 Filipinos* was a decision—albeit that of a district court—from within the Ninth Circuit, and would not be applied outside the Ninth Circuit. Respondent's effort thus to cross-breed collateral estoppel and stare decisis (see U.S. Br. 29 n.21) cannot bear fruit.

First, respondent overlooks the fact that *68 Filipinos* was not a decision of the Ninth Circuit. The

[10] The Second Circuit's decision in *Olegario* v. *United States*, 629 F.2d 204 (1980), cert. denied, 450 U.S. 980 (1981), should be sufficient evidence that the government has not behaved unreasonably by adhering to its position in this case.

goal of uniformity of decision within a circuit is properly served if district courts (and panels of the court of appeals) follow circuit precedent. By contrast, if a court of appeals is required to follow an unreviewed district court decision simply because that decision arises from within the particular circuit, the goal of intra-circuit uniformity is carried to an absurd extreme, at the expense of inter-circuit uniformity, and at the expense of the overriding goal of correctness of decision. See *Standefer* v. *United States*, 447 U.S. 10, 23 n.18 (1980). The court of appeals' extension of collateral estoppel in this case thus represents an abdication of the court's appellate review responsibilities.[11]

Second, it ordinarily is not controlling for collateral estoppel purposes that the decision potentially to be given preclusive effect arose in a different circuit than the case in which the rule of preclusion is to be applied.[12] By contrast, "when the issue was determined in the first action by a trial court and in the

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[11] In addition, the value of independent appraisal of legal questions is not limited to the courts of appeals. Logically, the district courts must be equally free to consider afresh the legal conclusions of sister courts on recurring issues. Otherwise, the courts of appeals would be unable to engage in meaningful appellate review of district court decisions.

[12] We note that respondent's counsel, acting on behalf of the Association of Immigration and Nationality Lawyers, unsuccessfully urged the Second Circuit to apply collateral estoppel against the United States in *Olegario* v. *United States*, *supra*. See 629 F.2d at 207, 214-215. The Second Circuit's rejection of that argument did not rest upon the fact that *68 Filipinos* arose outside the Second Circuit. And the court of appeals below indicated only that it *might* view the case differently if the estoppel invoked were inter-circuit (Pet. App. 17a n.14).

second action will probably be taken to an appellate court" or when "the issue is of general interest and has not been resolved by the highest appellate court that can resolve it," issue preclusion is disfavored. Restatement (Second) of Judgments § 29 comment i (1982). Thus, the distinction drawn by respondent is perverse, mechanically elevating the decision of a single district court within a particular circuit above the decision of another court of appeals. Respondent's strained effort to reconcile the decision below with the traditional independence of the various courts of appeals, and with the role of this Court as the arbiter of inter-circuit conflicts, is understandable. But consistent adherence to the doctrine of stare decisis (along with its established limits) preserves the independent function of the circuits and the existing process of development of the public law without the paradoxical consequences that flow from respondent's hybrid of collateral estoppel and stare decisis.

Moreover, we are simply unable to understand respondent's treatment (Br. 8) of the impact of expanded collateral estoppel on the certiorari jurisdiction of this Court. Respondent acknowledges (Br. 23 & n. 11; see also Br. 8) that the decision below, coupled with *68 Filipinos*, creates a "conflict in the circuits" on the underlying issue when viewed against the Second Circuit's decision in *Olegario*. Respondent argues, however, that "any unfairness that may result from the application of collateral estoppel in the case is no greater than that resulting whenever circuits disagree" (Br. 8). But it is fundamental that when circuits disagree on a legal issue, this Court may resolve the conflict. Here, the logical implication of respondent's argument is that this Court would be obliged to uphold the decisions of *both* the Second and Ninth Circuits, on the peculiar theory

that each correctly states the law of its circuit. There is no reason to sanction such a bizarre result, which detracts from the authority of this Court as the final judicial arbiter of "what the law is" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).[13]

3. Respondent also contends (Br. 5-9) that, on the particular facts presented, the application of collateral estoppel sanctioned by the court of appeals is not unfair. The thrust of respondent's contention (Br. 5-6) is that, by withdrawing its appeal in *68 Filipinos*, the government knowingly bound itself to accede to the naturalization of all Filipino veterans regardless of their failure to take any action to avail themselves of that opportunity prior to the statutory deadline. But, as we have previously explained (U.S. Br. 11-12 & n. 12, 31-32, 34 n. 29), there is no warrant for that characterization of the government's action. Nor did the government take any action that could have caused respondent or others similarly situated to rely to their detriment upon such an understanding of the government's position.[14]

As explained in our opening brief (at 12-13 & n. 13), the possibility that certain individuals who had filed their petitions for naturalization prior to withdrawal of the *68 Filipinos* appeal may have agreed to hold them in abeyance on the understanding that the result in *68 Filipinos* would be treated as a test case led to the adoption of the Solicitor General's "grandfather rule." But that policy was

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[13] This result is particularly ironic, because it would be the product of a legal doctrine that respondent defends as necessary to "promote uniformity" in the law (Resp. Br. 9).

[14] The passages in the government's appellate brief in *68 Filipinos* and its petition for a writ of certiorari in *Hibi*, to which respondent points (Br. 5 & n. 1), reflect only the anticipated stare decisis impact of the challenged decisions.

not extended to those, such as respondent, who had not filed a petition for naturalization before withdrawal of the *68 Filipinos* appeal and accordingly cannot claim detrimental reliance.[15] The government has thus more than met its obligation to abide by the *judgment* in *68 Filipinos*. See *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981). On the other hand, particularly at the time the appeal was withdrawn in *68 Filipinos*, neither the United States nor any Filipino veteran had reason to believe that the district court's legal conclusions would be controlling in all future cases. See U.S. Br. 34 n.29. The surprising extension of collateral estoppel effectuated in this case is indeed unfair to the United States, as well as to all those who seek naturalization in accordance with the requirements of the law. By contrast, respondent has not adduced any reason why he should be naturalized without establishing a basis in law for that benefit.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1983

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[15] Respondent's argument (Br. 5-6) appears designed to benefit those Filipino veterans who did not even file a naturalization petition while *68 Filipinos* was pending, but who were simply counting on availing themselves of its holding in the event of a favorable decision. But those veterans adopting such a "wait and see" attitude would not in any event be permitted to invoke collateral estoppel. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 330 & n. 13, 331. Respondent denies following this course (Pet. App. 16a n. 11).

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